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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
 )  
Western Wireless Corporation )  
 )  
Petition For Designation as an )  
Eligible Telecommunications Carrier )  
in the State of Wyoming )

CC Docket No. 96-45

**OPPOSITION**  
**OF THE**  
**COALITION OF RURAL TELEPHONE COMPANIES**

December 17, 1999

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## SUMMARY

The Coalition of Rural Telephone Companies submits this Opposition to the Petition filed by Western Wireless Corporation (“WW”) seeking designation as an Eligible Telecommunications Carrier (“ETC”) in the State of Wyoming. WW has not demonstrated that it can or will satisfy all relevant ETC requirements. A future intent expressed by WW is not sufficient. Moreover, there is no showing that the universal service and public interest objectives which ETC designation is intended to serve would be advanced by designating WW as an ETC, particularly with respect to the areas served by rural telephone companies. In fact, it is likely that several of the relevant universal service objectives would be threatened if WW were designated an ETC.

In any event, the jurisdictional premise of the WW Petition is unclear. If the Commission accepts the WW Petition based on WW’s jurisdictional analysis, the Commission should reconcile any action with previous, apparently contrary decisions and rules.

The Commission’s *Ninth Report and Order* presents new rules and policies that are left unaddressed in the context of the WW Petition and application to wireless and CMRS providers. The rules require clarification which will, in turn, require that WW amend or supplement the record prior to meaningful comment and evaluation.

WW has failed to explain how eligible “universal services” it may provide would, if at all, be distinguished from ineligible CMRS services. Accordingly, the possibility arises that if WW were to be designated as an ETC, the application of the current rules could allow WW to claim support for all of its subscribers.

Several of the Commission’s policies require reevaluation and clarification to ensure reasonable neutrality of universal service policies. The current rules cannot be applied to CMRS

and wireless provision of service without arbitrary results. The specific treatment of fixed wireless service relative to CMRS, the local usage component required of ETCs, and the disparate interconnection and local exchange carrier responsibilities and rights require resolution, reevaluation or revision with respect to the issues presented by the WW Petition. Moreover, the new rules that would apply to competitive ETCs also contain conceptual approaches that breakdown and are unworkable when applied to CMRS or wireless shared-spectrum service applications.

For the reasons outlined in this Opposition and the record before the Commission in related proceedings, the WW Petition should be dismissed.

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COALITION OF RURAL TELEPHONE COMPANIES**

The Coalition of Rural Telephone Companies ("Coalition")<sup>1</sup> respectfully submits this Opposition to the petition filed on September 29, 1999, by Western Wireless Corporation ("WW").<sup>2</sup> The Commission is seeking comment on the issues raised by WW seeking Eligible Telecommunications Carrier ("ETC") status in the State of Wyoming.<sup>3</sup> Several state ETC proceedings, including those in the states of the Coalition members, present issues directly related to the resolution of the WW Petition in this instant proceeding. Therefore, the Coalition members are potentially affected by, and therefore have an interest in, any decision in this proceeding.

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<sup>1</sup> The members of the Coalition are state-organized groups of rural local exchange carriers ("LECs"). The Coalition includes 29 LEC members of the State Independent Telephone Association of Kansas, 21 Independent LECs in Minnesota, and 18 Independent LECs in Nebraska. Each of the 68 rural LECs is a "rural telephone company" as that term is defined in the Act. See 47 U.S.C. § 153(37). All of the LEC members of the Coalition have been designated ETCs by their respective state regulatory authorities.

<sup>2</sup> See *Public Notice*, DA 99-2511, released by the Commission on November 12, 1999.

<sup>3</sup> The Coalition participated in opposition comments filed in Docket No. 96-45 (DA 99-1356)("Coalition South Dakota Opposition Comments" filed September 2, 1999) addressing the WW request that the Commission preempt a decision of the South Dakota Public Utilities Commission not to designate WW as an ETC. So as not to burden the record with redundant comments, the Coalition incorporates by reference herein the Coalition South Dakota Opposition Comments.

## I. INTRODUCTION

As this Opposition demonstrates, there remains a crucial need for Commission attention to universal service policies and rules, particularly with respect to CMRS providers. Several key aspects remain undefined or unworkable with respect to CMRS applications. As a result, the public, as well as the Commission, are deterred in any meaningful examination of the public interest considerations and potential effects of ETC designation of CMRS providers. The Commission's most recent Universal Service decision presents a new set of issues and concepts which have not been addressed in this or previous WW ETC proceedings.<sup>4</sup> The lack of sufficient direction and required definitions with respect to how rules are to apply to WW prevents the public from providing full comment on the issues presented by the WW Petition and prevents the Commission from making the findings required by statute for approval of the WW Petition at this time.

Regardless of the uncertain policy, the request of WW is cursory, vague, and fatally lacking in critical detail.<sup>5</sup> The approach that WW takes here and similarly in other states is simply to recite that it is a Commercial Mobile Radio Service ("CMRS") provider, that it wants to offer some yet indiscernible service (including an offering of a fixed service component), and that it intends to fulfill the universal service objectives expected of ETCs. There is no demonstration in the record that WW can or will satisfy all relevant ETC requirements. Moreover, the WW filings do not provide a sufficient basis for a determination that the universal service objectives and public interest would be served by designating WW as an ETC,

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<sup>4</sup> *Ninth Report and Order and Eighteenth Order on Reconsideration*, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, released November 2, 1999. ("*Ninth Report and Order*"),

<sup>5</sup> See, e.g., Coalition South Dakota Opposition Comments at 27-28 and n. 90 (regarding speculative claims about service provision and terms and conditions).

particularly in the service areas of rural telephone companies. Therefore, the Commission should reject the WW Petition.

## **II. THE JURISDICTIONAL PREMISE IS UNCLEAR.**

To establish Commission jurisdiction to act on its Petition, WW first claims that the Wyoming PSC lacks jurisdiction to act under Section 214(e) because WW, as a CMRS provider, is exempt from state entry and rate regulation pursuant to Section 332(c)(3) of the Communications Act.<sup>6</sup> This assertion is wrong for several reasons. First, state designation of ETCs is not even arguably “entry” regulation, but rather is within the scope of Section 332(c)(3) which permits states to regulate “other terms and conditions.”<sup>7</sup> Second, at least on the surface, the service proposed is apparently a fixed service, and the Commission has expressly reserved determination of whether such non-mobile services are nevertheless included within the scope of CMRS. Third, if the Wyoming PSC lacks jurisdiction because WW provides CMRS service in addition to its proposed fixed service, then the other twelve states in which WW has filed for ETC status also have no jurisdiction. WW has celebrated its preliminary grant of ETC status in Minnesota, yet that preliminary grant would be invalid under WW’s Section 332 theory. Finally, the Wyoming PSC declined jurisdiction on the basis of its organic act, rather than its interpretation of Section 332.

WW then asserts that the Commission has jurisdiction because the Wyoming PSC dismissed its ETC application on the basis of the Wyoming statute which excludes from the jurisdiction of the PSC “telecommunications services using radio spectrum or cellular

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<sup>6</sup> WW Petition at 4.

<sup>7</sup> *See also* Coalition South Dakota Opposition Comments at 16-17 and 24-27.

technology.”<sup>8</sup> However, excepted from this limitation is authority with respect to “the quality of cellular service to the extent not preempted by federal law.” The Wyoming PSC must, of course, be given considerable deference in interpreting its organic act, and in any event cannot be compelled to act on a Section 214(e) application.<sup>9</sup> Nevertheless, the issues are far from clear. The words of Section 214(e)(6) granting FCC jurisdiction where a carrier is “not subject to the jurisdiction of a State commission” speaks in terms of *in personam* jurisdiction and do not entirely resolve situations such as presented here where the carrier is subject to the PSC’s jurisdiction for some purposes.<sup>10</sup>

If the Commission accepts this application on the basis of the Wyoming PSC’s conclusion, the Commission should articulate its interpretation of the application of Section 214(e)(6) to situations involving state commissions with limited jurisdiction over some or all carriers. In the *Universal Service Order* the Commission stated its belief that states without the “full panoply” of jurisdiction could nevertheless grant ETC status.<sup>11</sup> Any acceptance of jurisdiction in this case should explain why the previous conclusion is not applicable. This issue is also relevant to the question of certification of compliance with Section 254(e) as discussed below.

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<sup>8</sup> Wyoming Telecommunications Act of 1995, Sec. 37-15-104(a)(vi).

<sup>9</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>10</sup> The Wyoming statute is not without some ambiguity in that despite the exclusion of services using radio spectrum or cellular technology from the definition of telecommunications service by Section 37-15-104, Section 37-15-103(a)(xii) defines telecommunications service as the offering of telecommunications by means of “wire, *radio*, lightwave or other means.” (emphasis added).

<sup>11</sup> *Report and Order*, Federal State Joint Board on Universal Service, 12 FCC Rcd 8776, 8859 (1997) (“*Universal Service Order*”) (para. 147).



### **III. WW HAS NOT SHOWN THAT GRANT OF ETC STATUS IS CONSISTENT WITH THE UNIVERSAL SERVICE PURPOSES OF THE ACT.**

Regardless of whether WW satisfies what it believes are the minimal ETC criteria, Congress adopted explicit public interest objectives with respect to ETC designations intended to serve the objectives and principles of Universal Service.<sup>12</sup> Section 214(e)(1) explicitly states that designation of an ETC is “in accordance with section 254 . . . ,”<sup>13</sup> and Section 254 states that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive . . . support,”<sup>14</sup> and that “[a]ny such support should be explicit and sufficient to achieve the purposes of this section [254].”<sup>15</sup> Congress necessarily intended that Section 214 be directly related to Section 254. Designation of WW as an ETC in Wyoming would frustrate several of the universal service objectives contained in Section 254.

Foremost, it is unreasonably speculative to claim that the provision of CMRS services by WW will promote quality service provision.<sup>16</sup> The relative quality of WW’s service<sup>17</sup> in

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<sup>12</sup> Once a carrier is designated as an ETC and will receive support, the ETC “shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” *See* 47 U.S.C. § 254(e). The Commission recently enacted rules to ensure that universal service support is being applied for the intended purposes. *See* 47 C.F.R. § 54.313.

<sup>13</sup> 47 U.S.C. § 214(e)(1).

<sup>14</sup> 47 U.S.C. § 254(e).

<sup>15</sup> *Id.*

<sup>16</sup> *See* 47 U.S.C. § 254(e)(1). *See also* Coalition South Dakota Opposition Comments at p. 18.

<sup>17</sup> For example, what is the availability of bandwidth for WW’s yet-to-be offered service? At what maximum data speed is the service capable? Is WW’s network peak traffic carrying capacity adequate for ETC and universal service purposes? The proposed service requires battery backup which permits only one hour of talk time and eight hours of standby in the event of commercial power loss. *See also* Coalition South Dakota Opposition Comments at 42 and n. 114.

Wyoming is essentially unknown because it is not in operation.<sup>18</sup> The WW exhibit notes, however, that the proposed service cannot be used in healthcare facilities.<sup>19</sup> It is equally uncertain whether anyone can expect WW to offer, or to be able to provide, comparable quality services at just, reasonable, and affordable rates.<sup>20</sup>

It also is clear that the substitution of CMRS-based service, funded by universal service support, will not lead to greater access to advanced telecommunications and information services in all regions of the Nation.<sup>21</sup> A review of the Commission's recent initiatives<sup>22</sup> and the national network deployment already underway suggest strongly that the future of ubiquitous availability of broadband and advanced services lies with evolving wireline and terrestrial networks.<sup>23</sup> The

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<sup>18</sup> Regardless of what WW intends, the record does not establish any evidence that WW actually offers in Wyoming a fixed service utilizing specific customer premises equipment or that a flat-rate for local usage service is offered. Nor does WW offer toll limitation service to low income subscribers. See 47 C.F.R. § 54.101(a)(2) and (a)(9).

<sup>19</sup> WW Petition, Exhibit B at p. 11 (under safety information, electronic devices: "Do not use your Phonocell SX unit in health care facilities.")

<sup>20</sup> 47 U.S.C. § 254(e)(1).

<sup>21</sup> 47 U.S.C. § 254(e)(2).

<sup>22</sup> See, e.g., *First Report and Order and Further Notice of Proposed Rulemaking*, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, released March 31, 1999; *Order*, In the Matter of Federal-State Joint Conference on Advanced Telecommunications Services; CC Docket No. 99-294, released October 8, 1999; *Notice of Proposed Rulemaking*, In the Matter of Local Competition and Broadband Reporting, CC Docket 99-301, released October 22, 1999; and *Third Report and Order in CC Docket No. 98-147*, *Fourth Report and Order in CC Docket No. 96-98*, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98, released December 9, 1999.

<sup>23</sup> See also *Report*, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 FCC Rcd at 2398. Chart 2 refers to current capabilities and technologies in the advanced services examination. *Id.* at 2431. Cellular and PCS are not listed in the chart.

WW Petition neither recognizes, discusses nor addresses these conflicts.

Moreover, there is no basis in the WW Petition to conclude that a grant of ETC status will result in all consumers, including low-income and those in rural, high cost areas, having access to telecommunications services, including advanced services, that are reasonably comparable to those services provided in urban areas and at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>24</sup> WW has not provided the public, the Commission, or the citizens of Wyoming with any substantively relevant information (e.g., service characteristics or an offer of service quality, prices, and other terms). WW cannot claim to serve this ETC goal.

Finally, because the current universal service high cost support rules and mechanics have been developed without adequate recognition of potential application to CMRS providers, there cannot be any conclusion about what the resulting support mechanism would be, assuming *arguendo* that WW were to be designated an ETC, and whether the overall plan would be specific, predictable or sufficient to preserve and advance universal service.<sup>25</sup>

In the *Ninth Report and Order*, the Commission has explicitly recognized the importance of the universal service public interest objectives with respect to ETC designation and high cost support. The Commission has concluded that federal high-cost support should be accounted for in the ratemaking process for intrastate rates and has required states to take appropriate steps to ensure that the use of high-cost support is in accordance with the universal service provisions of Section 254 of the Act.<sup>26</sup> The Commission wants to ensure that the proper purposes are achieved

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<sup>24</sup> 47 U.S.C. § 254(e)(3).

<sup>25</sup> 47 U.S.C. § 254(e)(5).

<sup>26</sup> *Ninth Report and Order* at para. 95.

with high cost funds including assurance that support leads to reasonable comparability of rates (consistent with the objectives of Section 254).<sup>27</sup> According to the latest order, States are required to certify to the Commission that all federal universal service high-cost support will be used in a manner consistent with the Act.<sup>28</sup> This certification process is equally applicable to competitive ETCs (“CETCs”).<sup>29</sup>

In instances where states do not have sufficient ratemaking authority over carriers, non-rural ETCs and CETCs must initiate the certification process and formulate plans to satisfy the requirements.<sup>30</sup> States, in these instances, are still required to certify that the subject carriers have accounted to state commissions regarding the proper use of federal funds.<sup>31</sup> However, the rules and discussion in the *Ninth Report and Order* are silent with respect to how, if at all, the purpose of the certification process is to be accomplished in states where commissions may decide that insufficient authority exists to administer the certification process. The Wyoming PCS’s decision on its Section 214(e) authority suggests it could also decide it has no authority to issue the Section 54.313 certification.

Accordingly, these new provisions add critically unaddressed dimensions and requirements with respect to the status of the Wyoming WW ETC matter. WW has not stated whether it will initiate any such certification process, and in most states where WW has sought ETC status, WW has generally held that, in response to ETC request evaluation, it need not

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<sup>27</sup> *Id.*

<sup>28</sup> For example, the Commission suggests that states can adjust intrastate rates or require a carrier to use funds to upgrade facilities; however, states retain the flexibility to decide how carriers should use support funds provided by the federal mechanism. *Id.* at para. 96.

<sup>29</sup> *Id.* at para. 97

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

provide the sort of information and commitment contemplated by the new certification process.<sup>32</sup>

Furthermore, it is not clear how the new Section 54.313 certification rules apply to carriers granted ETC status pursuant to Section 214(e)(6).<sup>33</sup> Therefore, until the rules are clarified, the Commission cannot make the necessary findings. After the deficiencies are corrected or clarified, and prior to evaluation and public comment, WW should be required to amend and supplement its request consistent with the rules.

#### **IV. THE COMMISSION'S PUBLIC INTEREST ANALYSIS MUST PROPERLY CONSIDER THE IMPACT OF POTENTIAL ETC DESIGNATIONS ON CUSTOMERS IN RURAL AND HIGH COST AREAS.**

Congress codified additional "public interest" criteria for areas served by rural LECs to balance the conflicting goals of promoting more competitors with maintenance of universal service in rural areas. In reviewing ETC designation requests, the Commission cannot neglect the Congressional intent that universal service and the public interest be critically evaluated with respect to the special interests of customers served in high-cost, rural telephone company areas.

A particular concern in low density, high cost areas served by rural telephone companies is that provision of universal service funding to duplicate, competing networks could have the counter-productive effect of depriving either network of the necessary support.<sup>34</sup> Providing

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<sup>32</sup> See, e.g. Coalition South Dakota Opposition Comments at 5-10. WW has previously maintained that universal service principles and objectives as set forth in Section 254 of the Act should not be considered by state commissions. *Id.* at 15.

<sup>33</sup> Will such carriers formulate plans and present these plans to the Commission? See *Ninth Report and Order* at para. 97 What criteria will be applied in evaluating such plans?

<sup>34</sup> See Coalition South Dakota Opposition Comments at 29-32 discussing similar policy issues that States must consider. Furthermore, the Commission's *Ninth Report and Order* perpetuates a universal service plan approach that is fundamentally defective with respect to high cost network modeling. The modeling approach "predicts" network costs based on the design and cost characteristics of a single wireline network that would have to be built and operated to serve all customers in a particular wire center area. However, if there are multiple providers, there will  
(continued...)

multiple provider ETC access to scarce support mechanisms could undermine the goals of universal service in areas that lack the demographic and service characteristics to support more than one network.<sup>35</sup> The examination of an ETC request must consider factors other than the basic ETC criteria or the mere promotion of more competitors. If the promotion of more carriers (at the expense of promotion of universal service) were the sole consideration, then Congress would have had no purpose in establishing the separate public interest finding requirements with respect to areas served by rural telephone companies, because all requesting carriers potentially represent more competitors. Therefore, a proper public interest finding must evaluate the ability of the areas served by rural telephone companies to support multiple ETCs.

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<sup>34</sup>(...continued)

not be a single network; there will be multiple networks which will be inescapably redundant in some ways. As such, the total cost of networks when universal service is provided in a wire center by two providers is more than the cost of a single network. *See, e.g.,* Coalition South Dakota Opposition Comments at pp. 38-41. In other words, the number of network providers operating in a given wire center area should be an independent variable that influences the results of the formula calculation of network costs. As service provision is divided in a market, each carrier loses economy of scale. In an example of two providers splitting the market equally, the number of customers served per square mile for each network provider will be half of what the density was when there was only one provider. The modeling approach appears to totally disregard this obvious dynamic. In sparsely populated areas, the reduction in economy of scale can lead to enormous changes in the per-customer cost of networks that must stand ready to provide universal service to all. *See* Petition for Reconsideration and Clarification of the Rural Telephone Coalition, filed with the Commission on July 17, 1997, in CC Docket No. 96-45 at 12.

<sup>35</sup> Designating a second ETC in rural areas could have one of two adverse effects. Either the total cost of the universal service support plan must increase (and society will support this additional cost) or neither ETC will receive the funding needed to provide and maintain a ubiquitous, state-of-the-art network in high cost areas that remains ready to serve all at comparable rates.

**V. WW FAILS TO EXPLAIN HOW ITS ELIGIBLE UNIVERSAL SERVICE WILL BE DISTINGUISHED FROM ITS INELIGIBLE CMRS SERVICES.**

The WW Petition is unclear as to whether WW claims that both its mobile and fixed services comply with the Section 54.101 supported services criterion. WW, in its instant Petition, its ETC applications in other states, and the other two FCC applications, continues to make self-contradictory statements as to whether its claim of compliance with Section 54.101(a) is based upon its current mobile service offerings, or its proposed “wireless loop” fixed service. Because these contradictions have been challenged so often, they must be taken as intentional. Specifically, the WW Petition states at p. 3: “Today, Western Wireless provides all of the services and functionalities supported by the federal universal service program, enumerated in Section 54.101(a).”<sup>36</sup> On page 7 of the WW Petition, WW states that it “currently offers each of the supported services.”<sup>37</sup> Again, the DeJordy affidavit states that WW “currently offers and is

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<sup>36</sup> As soon as WW gets to the second criterion, local usage, WW shifts from present tense capability to future tense intentions, stating, for example, “Western Wireless satisfies the local usage criterion . . . based upon its *planned* offering of unlimited local usage.” WW Petition at 3, emphasis added. Similarly, regarding toll limitation, WW states that: “once designated an ETC, Western Wireless *will* participate in Lifeline as required, and *will* offer toll blocking . . . .” WW Petition at 6, emphasis added. WW states that it will participate in the lifeline program “as required.” Currently Subpart E of Part 54 of the Commission’s rules is structured under the assumption that ETCs are subject to state rate regulation, which is not the case with CMRS providers and some ILECs in some states. These rules should be revised accordingly.

<sup>37</sup> The later statement is hedged somewhat by the statement in footnote 16 that states that WW “intends to make investments to the extent necessary, to provide service throughout Wyoming once designated.” This implies that it cannot currently provide the supported services “throughout the service area. WW relies on *Fort Mojave* for the proposition that it must only offer or “be able to offer” the services. That statement, as has been repeatedly pointed out to WW, was made in the context of a Section 214(e)(6) application which relied on the special provisions of 47 C.F.R. 54.101(b) regarding specific requests for additional time to provide single party, E911 or toll limitation services, and not with respect to the provision of basic voice grade access.

able to provide within its designated service areas the service and functionalities . . . .”<sup>38</sup>

The issue of whether the Act and the Commission’s rules require the current offering of the supported services has been debated at length in the South Dakota preemption proceeding (DA 9-1356) and will not be repeated here.<sup>39</sup> There are two other issues raised by the internal contradiction in the WW Petition. The first is that, on its face, none of the unequivocal statements of WW can be accepted by the Commission because the contradictions illustrate that WW does not always mean what it says. Secondly, the contradictions raise a substantial question as to whether WW has intentionally created an ambiguity from which it can later argue that it is entitled to support for both its fixed service customers and its mobile subscribers.<sup>40</sup> Accordingly, the possibility arises that if WW were to be designated as a CETC, the application of the Commission’s Rule 54.307(b) could allow WW to claim support for all of its “loops” (however loops may eventually be defined for CMRS provider purposes as discussed below).

The issue of whether a CMRS provider, such as WW, designated as a CETC may claim high-cost support for all its services, including traditional mobile cellular service as well as any service provisioned by means of a hand-held wireless phone device, in addition to services provided by the novel fixed “wireless loop” service application, is not sufficiently addressed by

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<sup>38</sup> The DeJordy affidavit goes on to state that WW provides voice grade access to the public switched telephone network “through its interconnection arrangements with various local telephone companies, including Southwestern Bell.” Apparently Mr. DeJordy meant to say U S West. No specific interconnection arrangements with other local telephone companies are mentioned.

<sup>39</sup> Coalition South Dakota Opposition Comments at 20-24.

<sup>40</sup> *See, e.g.* Coalition South Dakota Opposition Comments at 8, n. 90, 33, and n. 100. Moreover, if ETC designation is intended only for a fixed service offering, WW has not (nor has anyone else) described how the fixed version can or will be distinguished from the mobile version.



the *Ninth Report and Order* or the WW Petition.<sup>41</sup> If somehow all CMRS services are otherwise ETC qualified, the result could be the creation of new, additional, and unintended universal service support funding requirements.

## **VI. CURRENT POLICIES AND RULES REQUIRE RECONCILIATION AND CLARIFICATION TO ENSURE REASONABLE NEUTRALITY.**

The Commission has required that universal service provisions be applied in a manner that is competitively and technologically neutral. However, under the current provisions, CMRS providers are given unwarranted and inconsistent advantages in violation of the neutrality policy. Problems with, and incongruity in, the current rules arise both with application to mobile CMRS provision of service as well as service provision by means of shared-spectrum, fixed, wireless methods.<sup>42</sup> These issues must be addressed before a public interest determination can be made

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<sup>41</sup> There are likely to be service areas in Wyoming where low-power, hand-held wireless phone devices may not achieve sufficient signal reception over WW's network while the "wireless loop" power and antenna application may achieve satisfactory performance. Nevertheless, the majority of potential customers can be expected to be located in areas where signal strength and calling performance using the popular hand-held phone devices is satisfactory for many users. Therefore, given that hand-held devices are adequate in most calling situations, WW has not explained, nor is it apparent, why an end user would want WW to install wireless loop equipment in his or her home, or why WW would want to incur the added cost of wireless loop equipment, if a traditional hand-held phone otherwise operates acceptably well. Moreover, why would an end user opt for an unmovable service in lieu of one that is transportable. If an end user orders WW's "Wireless Residential Services" and prefers a mobile handset, why would WW deny this application, particularly if it is less costly than the wireless loop equipment application? What prevents every current mobile cellular customer from converting their service to "Wireless Residential Service?"

<sup>42</sup> A mobile service cannot be arbitrarily assigned to, or counted within, a specific geographic wire center or study area. See 47 C.F.R. 54.307(b). Providers of wireless based services are referred to generally as CMRS providers in this section for convenience. The Coalition maintains that the provision of fixed service, whether by wire or wireless technology, is by definition not mobile and therefore not entitled to application under the CMRS provisions of the Act.

regarding the issues presented by the WW Petition.<sup>43</sup>

First, as the Commission is aware, the regulatory treatment and status of fixed services of CMRS providers remains unsettled.<sup>44</sup> Second, the Commission has not yet resolved the usage minimum for ETCs which is critical with respect to CMRS providers which almost universally do not offer an unlimited basic calling service as wireline LECs typically do.<sup>45</sup> Third, the zero-sum approach to the “portability” of available universal service high cost support apparently embodied in the current universal service provisions is flawed and harmful to universal service.<sup>46</sup> Fourth, the disparate manner in which LEC and interconnection requirements are applied to CMRS providers violates reasonable neutrality expectations.<sup>47</sup>

The *Ninth Report and Order* presents new issues and questions that have not been addressed with respect to application to CMRS providers. The Commission has adopted new rules governing universal service support for CETCs. In order to receive support, a CETC must

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<sup>43</sup> At a minimum, any approval must be conditional pending resolution of further rulemaking addressing these issues.

<sup>44</sup> Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, 11 FCC Rcd 8965 (1996). *See also* Coalition South Dakota Opposition Comments at 33-34.

<sup>45</sup> Although the Commission stated that it would determine by the end of 1997 what the usage should be, that determination has not been made. *Universal Service Order*, 12 FCC Rcd at 8813 (para. 67). In 1997, the Commission concluded that the amount of usage was a variable directly related to the level of forward-looking cost to be predicted by a model formula. *Id.* However, even though a model and actual inputs have now been adopted, the critical usage input has not been resolved and appears to be missing from the formula details. *See also* Coalition South Dakota Opposition Comments at 37-38.

<sup>46</sup> Coalition South Dakota Opposition Comments at 38-41.

<sup>47</sup> In its interconnection order, the Commission decided, for now, not to treat CMRS providers as LECs and not to subject CMRS providers to the obligations of LECs, but the Commission allowed CMRS providers to avail themselves of the rights of interconnection that are otherwise afforded to LECs. 11 FCC Rcd. 15499. 15995 (paras. 1004-5). *See also* Coalition South Dakota Opposition Comments at 42-45.

report, for non-rural incumbent LEC service areas, the number of “working loops” that it serves in each wire center in that service area, and for rural telephone company areas, the CETC must report the number of “working loops” in the service area.<sup>48</sup> Moreover, working loops are defined as working Exchange Line Cable & Wire Facility loops used jointly for exchange and message telecommunications service, including pay telephones but excluding WATS and TWX.<sup>49</sup>

The basic concepts embodied in these rules (i.e., loops, wires, cable, wire center, and service area) are not defined, and in some instances make no sense, with respect to CMRS, shared-spectrum services, and/or mobile service provider applications. Wire centers and loops are physical concepts relevant to wireline carriers. The lack of rules and relevant discussion in the *Ninth Report and Order* that would address CMRS applications in any non-arbitrary way is inconsistent with the Commission’s prior statements that competitive and technological neutrality are objectives to be examined and resolved.

Users of CMRS services share spectrum. There is no dedicated loop. CMRS providers do not routinely provide a dedicated channel (*i.e.*, a loop) for a particular user. A dedicated message path only exists when, where, and for the length of time that a CMRS user actually is placing or receiving a call.<sup>50</sup> Each individual transmission by a user establishes a momentary and geographically different transmission path. While the Commission has concluded that this momentary provision of shared-spectrum service is the equivalent of “single party service,” the policy discussion and rules are devoid of any discussion of how, if at all, the quantity of

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<sup>48</sup> 47 C.F.R. § 54.307(b).

<sup>49</sup> *Id.*

<sup>50</sup> *Universal Service Order*, 12 FCC Rcd. at 8810 (para. 62).

equivalent cable and wire facility loops for CMRS providers can be counted in any reasonably non-arbitrary and competitively neutral manner.

No methods have been proposed, nor are any non-arbitrary methods apparent, for application to shared-spectrum, CMRS providers. A quantification of CMRS provider telephone “numbers” to represent the quantity of loops would be unacceptably arbitrary because CMRS providers could easily “sell” second, third, or more numbers for a nominal fee (or give them away) simply to reward themselves with unwarranted USF support.<sup>51</sup> Additional numbers would have no meaningful relationship to an equivalent “amount” of universal service being provided. In contrast, with wireline service, there is a separate loop associated with each customer which can be counted and physically observed.<sup>52</sup>

Alternatively, if the number of CMRS phone units available for service were used as a surrogate for loops, the CMRS provider could easily sell cut-rate, additional CMRS phones for the purpose of putting every conceivable phone into “service” just to qualify for additional USF support. Potential CMRS providers that are CETCs could offer a very inexpensive service, with free phones, with little or no free usage (and high usage-based rates) which would add many supplemental, arbitrary “loops” that would reward the CMRS provider with unwarranted

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<sup>51</sup> Just as using numbers for wireline LECs would be equally arbitrary for use as a count for loops.

<sup>52</sup> For CMRS providers, a second assigned telephone number has an effective incremental cost of close to zero, aside from the cost of any usage associated with the additional telephone number. Once a CMRS provider begins to serve a given geographic area, its costs are almost entirely usage-sensitive. For that reason, CMRS providers could offer additional “numbers” (loops) to members of the same family, for example, at a substantial discount below the price charged for the initial number. At the extreme, to receive support, a CMRS provider could sell additional numbers for a penny a month, granting the CMRS provider an undeserved windfall.

support.<sup>53</sup> Since CMRS rates and service offerings are not generally regulated, there would be no ability to prevent such practices. In any event, the number of phones is not equivalent to the number of loops.<sup>54</sup>

The *Ninth Report and Order* is silent with respect to how “loops” are to be counted for CMRS, shared-spectrum providers. Until a non-arbitrary approach is proposed, explained, and examined, support for CETC shared-spectrum CMRS providers cannot be evaluated or calculated. There is no non-arbitrary method by which the Universal Service Administrative Company (“USAC”) could administer the rules for shared-spectrum, CMRS providers claiming “loops” in service.

Finally, in its most recent decisions, the Commission has constructed a model of the current wireline local telephone network (described as dedicated connection of customers’ premises to switching facilities, adequate switching capacity for peak periods, and routing of calls, all in the context of wire centers).<sup>55</sup> As such, the model does not consider factors associated with costs of CMRS, shared-spectrum networks and could reward CMRS, shared-spectrum providers with unwarranted cost recovery.<sup>56</sup>

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<sup>53</sup> For example, CMRS providers could give away incidental use phone units that customers could store away until needed. In this way, CMRS providers could maximize the number of phones in service (and the amount of universal service support funds). CMRS providers could also insulate themselves from the cost of providing an incidental use service by applying high usage rates for the limited occasions that users may actually initiate or terminate a call.

<sup>54</sup> Attempting to count “customers” or “billing accounts” to represent loops would suffer from the same and additional arbitrary drawbacks.

<sup>55</sup> See *Tenth Report and Order*, In the Matter of Federal-State Joint Board on Universal Service and Forward-Looking Mechanism for High-Cost Support for Non-Rural LECs, CC Docket Nos. 96-45 and 97-160, released November 2, 1999, (“*Tenth Report and Order*”) at paras. 12-16.

<sup>56</sup> *Id.*

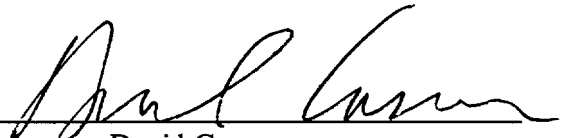
## VII. CONCLUSION

For the reasons stated in this Opposition, the Commission should reject the WW Petition and proceed to complete the necessary policy development and rules implementation.

Respectfully submitted,

THE COALITION OF  
RURAL TELEPHONE COMPANIES

Steven E. Watkins  
Principal, Management Consulting  
Kraskin, Lesse & Cosson, L.L.P.

By:   
David Cosson

Kraskin, Lesse & Cosson, L.L.P.  
2120 L Street, N.W., Suite 520  
Washington, D.C. 20037  
(202) 296-8890

Its Attorney

December 17, 1999

## **CERTIFICATE OF SERVICE**

I, Quita Gould, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Opposition of the Coalition of Rural Telephone Companies", was served this 17th day of December, 1999, by first class, U.S. Mail, postage prepaid to the following parties:

  
Quita Gould

Hon. William E. Kennard, Chairman \*  
Federal Communications Commission  
445 12th Street, SW, Room 8-B201  
Washington, DC 20554

Hon. Susan Ness, Commissioner \*  
Federal Communications Commission  
445 12th Street, SW, Room 8-B115  
Washington, DC 20554

Hon. Harold Furchtgott-Roth \*  
Commissioner  
Federal Communications Commission  
445 12th Street, SW, Room 8-A302  
Washington, DC 20554

Hon. Michael K. Powell, Commissioner \*  
Federal Communications Commission  
445 12th Street, SW, Room 8-A204  
Washington, DC 20554

Hon. Gloria Tristani, Commissioner \*  
Federal Communications Commission  
445 12th Street, SW, Room 8-C302  
Washington, DC 20554

Kathryn Brown, Chief of Staff \*  
Office of Chairman William E. Kennard  
Federal Communications Commission  
445 12th Street, SW, Room 8-B201  
Washington, DC 20554

Ari Fitzgerald, Legal Advisor \*  
Office of Chairman William E. Kennard  
Federal Communications Commission  
445 12th Street, SW, Room 8-B201  
Washington, DC 20554

Dorothy Attwood, Legal Advisor\*  
Office of Chairman Kennard  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-B201  
Washington, DC 20554

Linda Kinney, Legal Advisor \*  
Office of Commissioner Susan Ness  
Federal Communications Commission  
445 12th Street, SW, Room 8-B115  
Washington, DC 20554

Mark Schneider, Senior Legal Advisor\*  
Office of Commissioner  
Harold Furchtgott-Roth  
Federal Communications Commission  
445 12th Street, SW, Room 8-A302  
Washington, DC 20554

Rebecca Beynon, Legal Advisor \*  
Office of Commissioner  
Harold Furchtgott-Roth  
Federal Communications Commission  
445 12th Street, SW, Room 8-A302  
Washington, DC 20554

Robert Calaff, Legal Advisor\*  
Office of Commissioner  
Harold Furchtgott-Roth  
Federal Communications Commission  
445 12th Street, SW, Room 8-A302  
Washington, DC 20554

Kyle D. Dixon, Legal Advisor \*  
Office of Commissioner Michael K. Powell  
Federal Communications Commission  
445 12th Street, SW, Room 8-A204  
Washington, DC 20554

Peter Tenhula, Legal Advisor \*  
Office of Commissioner Michael K. Powell  
Federal Communications Commission  
445 12th Street, SW, Room 8-A204  
Washington, DC 20554

Adam Krinsky, Legal Advisor \*  
Office of Commissioner Gloria Tristani  
Federal Communications Commission  
445 12th Street, SW, Room 8-C302  
Washington, DC 20554

Sarah Whitesell, Legal Advisor \*  
Office of Commissioner Gloria Tristani  
Federal Communications Commission  
445 12th Street, SW, Room 8-C302  
Washington, DC 20554

Thomas Sugrue, Chief \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

James Schlichting, Deputy Chief \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 3-C254  
Washington, DC 20554

Steven Weingarten, Chief \*  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 4-C224  
Washington, DC 20554

Paul D'Ari, Chief \*  
Policy & Rules Branch  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 4-A325  
Washington, DC 20554

David Krech \*  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 4-A223  
Washington, DC 20554

Larry Strickling, Chief \*  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 5-C450  
Washington, DC 20554

Lisa Zaina, Deputy Chief \*  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 5-C451  
Washington, DC 20554

Irene Flannery, Chief \*  
Accounting Policy Division/CCB  
Federal Communications Commission  
445 12th Street, SW, Room 5-A426  
Washington, DC 20554

Charles Keller, Deputy Chief \*  
Accounting Policy Division/CCB  
Federal Communications Commission  
445 12th Street, SW, Room 5-A664  
Washington, DC 20554

Katie King \*  
Accounting Policy Division/CCB  
Federal Communications Commission  
445 12th Street, SW, Room 5-B550  
Washington, DC 20554

Sheryl Todd (3)  
Accounting Policy Division  
Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-A523  
Washington, DC 20554

International Transcription Services  
Federal Communications Commission  
1231 20<sup>th</sup> Street, NW  
Washington, DC 20554

Steve Ellenbecker, Chairman  
Wyoming Public Service Commission  
Hansen Building  
2515 Warren Avenue  
Suite 300  
Cheyenne, WY 82002



Steve Furtney, Deputy Chair  
Wyoming Public Service Commission  
Hansen Building  
2515 Warren Avenue  
Suite 300  
Cheyenne, WY 82002

Kristin H. Lee, Commissioner  
Wyoming Public Service Commission  
Hansen Building  
2515 Warren Avenue  
Suite 300  
Cheyenne, WY 82002

Michele C. Farquhar  
David L. Sieradzki  
Ronnie London  
Hogan & Hartson, LLP  
Columbia Square  
555 13th Street, NW  
Washington, DC 20004-1109  
Counsel for Western Wireless Corporation

Gene DeJordy  
Executive Director of Regulatory Affairs  
Western Wireless Corporation  
3650 131<sup>st</sup> Ave., SE, Suite 400  
Bellevue, WA 98006

\* Via Hand Delivery